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Martin Zelder  
*The Australian National University*

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# INCOMPLETELY REASONED SEX: A REVIEW OF POSNER'S SOMEWHAT MISLEADING GUIDE TO THE ECONOMIC ANALYSIS OF SEX AND FAMILY LAW

Martin Zelder\*

SEX AND REASON. By Richard A. Posner. Cambridge: Harvard University Press. 1992. Pp. vii, 458. \$29.95.

Richard Posner deserves substantial credit for advancing the public identity of modern law-and-economics scholarship. Thus, his latest book, *Sex and Reason*, may appear to the scholarly public and more casual readers as the definitive economic account of sex and sexuality. Posner declares his

ambition . . . to present a theory of sexuality that both explains the principal regularities in the practice of sex and in its social, including legal, regulation and points the way toward reforms in that regulation — thus a theory at once positive (descriptive) and normative (ethical). . . . [C]all it the economic theory of sexuality. [pp. 2-3]

Unfortunately, *Sex and Reason* only occasionally achieves this worthy goal; often it provides an inaccurate representation of economic analysis and its implications.

Criticizing Richard Posner is hardly a novel exercise.<sup>1</sup> Criticism of Posner stems from the impression, held by *American Economic Review* editor Orley Ashenfelter, that “Posner is more of an economist than most economists,”<sup>2</sup> a point echoed by John Donohue and Ian Ayres in their review of Posner’s *Economic Analysis of Law*: “While economics is a powerful and valuable tool in the analysis of legal and public pol-

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\* Lecturer, Department of Economics, Faculty of Economics and Commerce, The Australian National University. B.A. 1983, Oberlin College; M.A. 1985, Ph.D. 1989, University of Chicago. — Ed. Richard Posner patiently and thoughtfully provided a number of specific comments on earlier drafts of this review. The paper was also improved as the result of a series of discussions with Margaret J. Simpson, as well as by comments from Phillip Braun, Neal Devins, Arthur U. Ellis, Keith Hylton, Ray Zelder, members of the faculty workshop at Northwestern Law School, and discerning and intelligent recommendations by the editorial staff of the *Michigan Law Review*. None of those named above, however, should be assumed to endorse my interpretation, particularly Posner. This review was written while I was a visiting scholar at Northwestern Law School, which proved to be an extremely supportive environment.

1. The reviewers of another Posner creation even compared him, inappropriately, to Franz Liszt, whose “flashiness exceeded the bounds of the aesthetically pleasing, becoming at times unpleasant or even unlistenable.” John J. Donohue & Ian Ayres, *Posner’s Symphony No. 3: Thinking About the Unthinkable*, 39 STAN. L. REV. 791, 791 (1987) (reviewing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986)).

2. Conversation with Orley Ashenfelter (Apr. 7, 1992).

icy issues, those who use it need an appreciation of its limitations."<sup>3</sup> On the contrary, in *Sex and Reason*, Posner is not as much of an economist as he should be; at various points he limits the scope of application for his model of economically rational behavior,<sup>4</sup> misunderstands economics,<sup>5</sup> and uses discomforting rhetoric largely unrelated to economics to discuss rape and gay and lesbian life.<sup>6</sup>

In addressing some of the problems found in Posner's analysis, I argue that the contention of Donohue and Ayres, that economic analysis should be limited to certain forms of human behavior,<sup>7</sup> is ill-founded. Recent events have demonstrated the increasing acceptance of and enthusiasm for the application of economics to issues concerning the family, broadly construed, by economists and legal scholars. For example, the 1992 Nobel Prize in economics was conferred upon Gary Becker of the University of Chicago, the first person to use economics to analyze systematically major "familial" decisions such as marriage, childraising, and divorce.<sup>8</sup> Furthermore, the visibility of economic analysis of family law has increased in law reviews<sup>9</sup> and in the classroom.<sup>10</sup>

Outside the academy, economic analysis can explain individual choices regarding sex. For example, gay men have responded to the risk of AIDS by reducing the number of sexual partners and increasing condom use (p. 114). Economically rational behavior has also been exhibited by parent groups that have opposed free distribution of condoms to their high-school children; the groups have recognized that decreasing the risk of AIDS transmission or pregnancy reduces

3. Donohue & Ayres, *supra* note 1, at 793.

4. Posner's discussion of love illustrates this point. See *infra* notes 20-21 and accompanying text.

5. See, for example, Posner's mistaken analysis of sexual search by "effeminate" and non-"effeminate" men (p. 122) and, in contrast, the correct analysis performed in this review. See *infra* text accompanying notes 23-25.

6. This disconcerting rhetoric — "It might seem that the fewer homosexuals there are, the less dangerous they are along whatever dimension there is reason to fear them" (p. 295) — does not reflect Posner's view, but rather that of a person hostile to homosexuals. Posner conveyed to me his complete rejection of discrimination against homosexuals in a private communication. Letter from Judge Richard A. Posner to Martin Zelder (Sept. 18, 1992) (on file with author).

7. Donohue and Ayres, in subtitled their review *Thinking About the Unthinkable*, make it clear that using economics to analyze rape and adoption is "unthinkable." Donohue & Ayres, *supra* note 1, at 791, 793.

8. See, e.g., GARY S. BECKER, A TREATISE ON THE FAMILY (enlarged ed. 1991).

9. See, e.g., Margaret F. Brinig, *Rings and Promises*, 6 J.L. ECON. & ORG. 203 (1990); Lloyd Cohen, *Marriage Divorce, and Quasi Rents*; or, "I Gave Him the Best Years of My Life," 16 J. LEGAL STUD. 267 (1987); Martin Zelder, *The Economic Analysis of the Effect of No-Fault Divorce Law on the Divorce Rate*, 16 HARV. J.L. & PUB. POLY. 241 (1993); Martin Zelder, *Inefficient Dissolutions as a Consequence of Public Goods: The Case of No-Fault Divorce*, 22 J. LEGAL STUD. (forthcoming 1993) [hereinafter Zelder, *Inefficient Dissolutions*].

10. Family law courses emphasizing economic analysis have been taught at Marshall-Wythe School of Law, College of William and Mary (by the author), and at Chicago-Kent College of Law, Illinois Institute of Technology.

the cost of sex for those children.<sup>11</sup> Finally, even though many married people undoubtedly place a high value on sex with nonmarital partners, adultery rates are typically estimated to be far less than one hundred percent,<sup>12</sup> perhaps because adulterous sex is more costly than marital sex.

Posner offers his own worthy justifications for economic analysis of sexual behavior. He notes that "[s]tudents of sexuality recognize and deplore the lack of a rigorous and comprehensive scientific theory of human sexual behavior, but . . . have not sought assistance in theories of rational choice" (p. 3). Economic analysis is the best way to study sexual behavior because it "incorporates, integrates, and transcends the perspectives, insights, and findings of the other theories of sexuality that can fairly be described as either scientific or social scientific" (p. 3). However, Posner writes that "[t]he uncompromising, the truly unassimilable rival of the economic theory . . . is not scientific or social scientific; it is a heterogeneous cluster of moral theories," but "[t]hese theories . . . are not convergent" (p. 3), suggesting the likely conflict of different moral prescriptions for sexual behavior.

At the same time, Posner is unwilling to proclaim the superiority of the economic approach because "moral and religious beliefs" that underlie moral theories "are irreducible to genuine social interests or practical incentives" and are thus (for purposes of comparison) "incompatible with the broadly scientific outlook that informs the approaches [he] seek[s] to recast in the mold of economics" (p. 4). Nevertheless, in assessing the degree of social acceptance of his approach, Posner recognizes that "[a]n approximation to a scientific, nonmoral outlook on sexuality is highly influential today in northern Europe, especially Sweden, Denmark, and the Netherlands, as well as in Japan and other areas of East Asia," although this approach is "resisted most strongly by a diverse group of nations that includes the United States" (p. 4).

Accepting the singular potential of economics to explain sex, Posner's distortions and errors of economic analysis create the danger that many readers will perceive *Sex and Reason* as the ultimate application of economic analysis to sexual-familial issues, rather than a significantly flawed initial attempt.<sup>13</sup> Certainly, Posner's book is crucial because it addresses many issues that economists have virtually ignored.

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11. See Joseph Berger, *Distribution of Condoms Is Advocated*, N.Y. TIMES, Apr. 13, 1993, at B4.

12. See Arlie R. Hochschild, *Why Can't a Man Be More Like a Woman*, N.Y. TIMES, Nov. 15, 1987, § 6, at 3, 34 (reviewing SHERE HITE, *THE HITE REPORT: A CULTURAL REVOLUTION IN PROGRESS* (1987)).

13. Posner, however, in a private communication "disclaims any ambition to be definitive." Letter from Judge Richard A. Posner to Martin Zelder (Mar. 15, 1993) (on file with author). Indeed, he states in the book that "much work remains to be done on the normative as well as on the positive side of the economic analysis of sex." P. 440.

Indeed, the book is catalytic in eliciting systematic evaluation of some questions, in print, that had previously almost exclusively been pursued in the classroom, outside the brighter light of public scrutiny.<sup>14</sup> The value of carefully applying economic reasoning to sexual behavior is not inherent or aesthetic; rather, it is pragmatic because such analysis can serve "as a foundation for proposing reforms in law and public policy" (p. 7). Posner emphasizes this foundation, which is the "positive (descriptive)" analysis of sex, because "[s]ound reform depends on knowledge to a degree that lawyers do not always appreciate" (p. 7). Posner focuses less, and less successfully, on "normative (prescriptive)" evaluations (p. 7).

It is important, then, not to neglect the value of Posner's explorations, even if they sometimes lead one astray. *Sex and Reason* provides a rough, incomplete map to the territory of economic analysis of sexual-familial issues. As such, the book is useful to both scholars and lawmakers in identifying many sexual topics significant enough to justify economic analysis and in sketching out the specifics of this analysis for many of these topics. This review evaluates Posner's intellectual cartography, particularly his three identifiable realms of discourse — positive analysis of sexual behavior and sexual lawmaking, normative assessment of laws regulating sex, and infelicitous rhetoric on issues such as rape and "homosexuality" that are essentially unfounded in economic analysis.

## I. POSNER'S POSITIVISM

### A. *Positive Analysis of Sexual Lawmaking*

More than any other law-and-economics scholar, Posner has attempted to construct hypotheses that describe the pattern of legal rules limiting societies. This orientation aligns Posner, methodologically, with George Stigler and the Chicago School of regulation, which emerged from the public choice movement.<sup>15</sup> Consequently, the most prominent thread of Posner's positive analysis in *Sex and Reason* is the formulation of theories that explain laws governing sex; his other positive pursuit is to explain sexual behavior.

Positive theories such as these rest on the assumption that individual actors — judges, in the first case, sexual "consumers" in the second — are economically rational. Economic rationality means that an actor makes choices in a way that improves her own welfare ("utility"). Rational actors who maximize their own utility are also acting in a manner that maximizes the welfare of the entire society — in

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14. See Martin Zelder, *The Economic Analysis of Family Law 1* (1992) (unpublished manuscript, on file with author).

15. DENNIS W. CARLTON & JEFFREY M. PERLOFF, *MODERN INDUSTRIAL ORGANIZATION* 3, 784-87 (1990).

other words, they are taking economically efficient actions. But economic efficiency results from self-interested rational behavior only when individual actors participate in competitive markets free of any "market failures." Judges making decisions, however, are not ostensibly subject to the mechanisms of a competitive market free of market failures; thus, these judges, acting in their own self-interest, are not necessarily or even probably making efficient decisions.

Indeed, the deduction that law promotes efficiency receives only qualified theoretical support in the law-and-economics literature.<sup>16</sup> In other writing, Posner contends that "judges seek to impose their personal preferences and values on society,"<sup>17</sup> although these values will often be shaped by "a strong social consensus in favor of the use of the efficiency criterion."<sup>18</sup> Imputing an efficiency motive to judges ventures beyond the economist's fundamental assumption that judges are *rational* and thus may or may not be efficient in their holdings. In effect, Posner attaches a much more restrictive assumption to the behavior of judges than he does to consumer behavior, assuming "only" rational choices but not necessarily efficient outcomes for consumers.

Despite the limited theoretical support for the notion that laws promote efficiency, Posner in *Sex and Reason* regards efficiency as a primary factor explaining the content of sex laws. Only after thirty-five pages of his thirty-eight-page chapter, "Optimal Regulation of Sexuality," does Posner acknowledge that "[i]t would be heroic to contend that *all* sex laws can be explained on either efficiency or distributive grounds" (p. 217; emphasis added). In trying to fulfill this goal in much of his book, however, Posner misleads the reader into believing that this enterprise's outcome is the barometer of the success of law and economics.

Law and economics has been a valuable discipline for legal scholarship, and Posner's admission that it cannot fulfill a "heroic" mandate does not indicate that other analytical means are needed to study the law of sexual behavior. It is not surprising that Posner finds many divergences between existing common law rules and efficient legal rules; economic theory makes only modest predictions about convergence. Rather than suggest a need for theories outside of economics, this empirical divergence indicates that economists need to improve their articulation of judges' decisionmaking objectives.

### B. *Positive Analysis of Sexual Behavior*

Because of the misplaced emphasis upon the relationship between efficiency and the law described above, the virtues of *Sex and Reason*

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16. See ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 492-96 (1988) for a discussion of this literature.

17. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 506 (3d ed. 1986).

18. *Id.*

are less apparent. One of the book's strengths is its general, although unfortunately not exclusive, insistence on assuming economic rationality in the realm of sexual behavior.<sup>19</sup> This assumption produces a testable set of logically derived hypotheses about actual sexual behavior, particularly its response to changes in legal rules. As Posner recognizes, many of these hypotheses are "counterintuitive" (p. 6) and, as such, are not subject to one of the archetypal criticisms of law and economics, obviousness. At the same time, lack of obviousness contributes to the other, complementary criticism that law and economics is so abstruse and academic as to be irrelevant. Posner nevertheless manages to navigate this critical Scylla and Charybdis and, fittingly, presents an enumeration of concrete and imaginative predictions on, among other phenomena, AIDS and the birth rate, the incidence of polygamy and women's labor force participation, and rape and sexual permissiveness (pp. 6-7). In these explanations and others, Posner relies on major factors such as "the sex ratio," "the extent of urbanization," and "the changing occupational role of women" (p. 86).

Prior to this specific theorizing, Posner sketches the basic tenets of evolutionary biology to illustrate their similarity to economic principles such as specialization and risk aversion (p. 89). Despite his emphasis on the parallel between biology and economics, Posner's endeavor is not ultimately one of economic "imperialism"; economic methodology does not entirely usurp the dominant position of the prevailing methodology within, for example, biology-sexology.<sup>20</sup> Posner reveals his reluctance to enshrine economics as the dominant methodology in his discussion of substitution, a notion crucial to economics and to Posner's analysis, in the context of love:

Love illustrates the difference between a bioeconomic and a purely economic approach to sex. . . . A purely economic analysis would emphasize such factors as the high costs of search for a new mate, the costs of separation to children and, through altruism, to the parents, and the benefits to one's reputation of adhering to commitments. None of these factors, however, explains the emotional character of the love bond. [p. 118]

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19. In her review of *Sex and Reason*, Martha Nussbaum perceives this assumption to be unnecessarily, and perhaps fatally, limiting: "The largest problem in Posner's book . . . is that . . . he makes the mistake that Nietzsche eloquently exposed and warned against. He supposes, in effect, that if god is dead, the ethical and psychological complexities of sex, and of all its mystery, must go out the door too . . ." Martha Nussbaum, "Only Grey Matter"? *Richard Posner's Cost-Benefit Analysis of Sex*, 59 U. CHI. L. REV. 1689, 1708 (1992) (book review). Posner seems to concede this point when he maintains that "purely economic analysis" does not "explain[] the emotional character of the love bond." P. 118. Posner's concession and Nussbaum's point are unwarranted, however, as economic analysis of sex and love can account for (but not measure; no academic discipline can) spiritual and emotional values in its cost-benefit calculus, unless it is subjected to the arbitrary restrictions Nussbaum raises.

20. See Kenneth E. Boulding, *Economics as a Moral Science*, 59 AM. ECON. REV. 1, 8 (1969), who defines economic imperialism as "an attempt on the part of economics to take over all social sciences," a process about which Boulding retains reservation. *Id.* at 10.

In fact, asserts Posner, love "is a preoccupation with the unique particulars of another person, particulars for which there is, by definition, no substitute to be found in any other person" (p. 118). Consequently, it is incorrect to interpret Posner's "bioeconomic" (not "purely economic") model as implying that "happily married" spouses are "always . . . in the market for a better spouse" (p. 118), a phenomenon that exists in a "purely economic" model but is, presumably for Posner, not descriptive of reality. Contrary to Posner's claim, however, it is entirely consistent with a "purely economic" model for a "happily married" spouse not to engage in a search for a "better spouse"; the marriage market may well contain "better" spouses than one's current mate, but the costs involved in finding a "better" spouse and in divorcing to marry that "better" spouse (that is, risk, difficulty of reversing the divorce decision) may typically exceed the benefits from search, divorce, and remarriage for most "happily married" spouses. More fundamentally, Posner's self-imposed limitations on economic analysis stand in contradiction to the recent work of economists Gary S. Becker and Kevin M. Murphy on the formation of preferences, particularly addictive ones,<sup>21</sup> which are analogous to love, "a preoccupation with the unique particulars of another person, particulars for which there is, by definition, no substitute to be found in any other person" (p. 118).

Posner's selectivity thus allows him to gather the economic ideas he wishes without accepting economics as necessarily the sole explanatory method for his project. Posner categorizes the most influential economic factors as "search costs," "urbanization," "income and wealth," "the effective sex ratio," and "religion and education." In some cases his analysis of the effects of these factors is correct, but not in others.

Posner applies the economic theory of search to numerous situations. Some of these applications are logical and yet surprising in their result. For example, he deduces that handsome heterosexual men will engage in more homosexual sex than nonhandsome heterosexual men. In Posner's analysis, each person possesses an orientation toward men or women but may be willing to substitute away from his or her orientation if sex with the "other" gender is available at a low enough price (pp. 98-142), although, presumably, some people would require *payment* to engage in sex with the "other" gender. Thus, a heterosexual (in orientation) might engage in homosexual sex at the right price, and vice versa. Because "men tend to find good looks more sexually arousing than women do," the cost of homosexual sex relative to heterosexual sex for a handsome man is lower than for a nonhandsome man (p. 123). In other words, although handsome men are valued more than

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21. Gary S. Becker & Kevin M. Murphy, *A Theory of Rational Addiction*, 96 J. POL. ECON. 675 (1988).



nonhandsome men by both men and women, men place a relatively higher value on the handsome men than women do.<sup>22</sup>

At the same time, Posner's other wide-ranging attempts to perform economic analysis of sexual "search" provide numerous instances where greater contemplation and formalization would benefit the analysis. Consider Posner's analysis of "effeminate" heterosexual men who, Posner reasons, will have more homosexual sex than non-effeminate heterosexual men due to the lower relative price of homosexual sex for the effeminate man. He bases this conclusion on the assumption that effeminate men are more likely to be gay<sup>23</sup> and, more importantly, on the notion that "if women are not sure which effeminate men are heterosexual, they will tend to apply a discount factor to all such men — especially in the age of AIDS" (p. 122). This notion is logically incorrect. First, it is based on the premise that heterosexual women will value sex with gay men less than sex with equally effeminate heterosexual men even though these women cannot identify which men are gay. Second, Posner implies that risk of AIDS will also lower the relative price of homosexual sex to heterosexual sex for the effeminate man because only women are assumed to discount the value of sex with effeminate men. However, *men* will also discount the value of sex with effeminate men. Thus, AIDS risk decreases the value of sex with effeminate men for *both* women and men, and may thus *raise* the relative price of search for gay sex for effeminate men.<sup>24</sup>

This analysis is more fundamentally defective because it accepts descriptions such as "handsome" and "effeminate" as if they are exogenous, objective measures devoid of endogenous, social construction. The analysis of these socially constructed attributes should address how they are established rather than taking them as given.<sup>25</sup> More-

22. Note that the analysis underlying this conclusion is not heteroandrocentric, a general criticism raised by other critics, but rather anti-heteroandrocentric; heterosexual men are the object of choice by women and gay men. See William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Towards a Gaylegal Agenda*, 102 YALE L.J. 333, 333-34 (1992); Gillian K. Hadfield, *Flirting with Science: Richard Posner on the Bioeconomics of Sexual Man*, 106 HARV. L. REV. 479, 485 (1992) (reviewing RICHARD A. POSNER, *SEX AND REASON* (1992)).

23. P. 123. Posner assumes that "[a]s one moves along the spectrum from the conventionally masculine to the effeminate, the percentage of men who are homosexual rises." P. 122.

24. Posner's discussion of search gives rise to another problem. He notes that prior cohabitators have marriages no more stable, on average, than people who do not cohabit prior to marriage. The customary economic analysis would predict greater stability for cohabitators because they have acquired more information about their mates than noncohabitators (holding every other characteristic equal between the two groups, as is standard in economic analysis). Posner, however, explains this phenomenon by assuming that the cohabitators and the noncohabitators "have the same amount of information when they marry" (p. 120), an unfounded presumption that "explains" the empirical finding.

25. Eskridge and Hadfield both discuss the limitations of Posner's analysis due to his reluctance to model social and sexual preferences as endogenously socially constructed. See Eskridge, *supra* note 22, at 375-76; Hadfield, *supra* note 22, at 490. Most economic analysis (perhaps all social science), regardless of topic, could be criticized for failing to incorporate endogeneity pre-

over, one could use public policy to address how heterosexuals form comprehensive and general opinions about homosexuality in order to reduce discrimination, if society so desires.<sup>26</sup>

Posner also unsatisfactorily analyzes the consequence of urbanization. Posner correctly notes that urban areas are likely to attract people with rare preferences (p. 126), sexual and otherwise. The reason for this phenomenon is not, as Posner claims, the reduction in search costs due to increasing the pool of available mates (pp. 126-27). While one thousand times more potential gay mates reside in New York than in Dubuque, one thousand times more *competitors* also live in New York. On this basis, economic theory cannot predict whether New York will attract additional gay men beyond the *proportion* found in Dubuque. For cities to be proportionately more gay than small towns requires the presence of public goods (for example, gay newspapers) that small towns cannot support if their population of gay men is too small in absolute terms.<sup>27</sup> These public goods result from economies of scale; for example, once a newspaper is established it can be offered at very low cost to additional customers.<sup>28</sup>

To his analysis of "income and wealth" effects on sex, Posner applies Gary Becker's household production framework<sup>29</sup> with success, although the result may be confusing to the noneconomist reader. He recognizes that sex is probably a normal or superior good;<sup>30</sup> people consume more of it as their income rises, holding the price of sex, primarily time during which wages could be earned, constant (pp. 133-35). However, he later states that "[i]t would be wrong to conclude, however, that as incomes in a society rise, sex must *inevitably* become less frequent or more hurried" (p. 135; emphasis added), as if this were

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cisely. A prominent exception is the Becker and Murphy paper on rational addiction, *supra* note 21.

26. See *infra* text notes 76-77.

27. Other examples of public goods, such as unusual sexual habits and anonymity, are mentioned by Posner in the book and in a subsequent article, Richard A. Posner, *The Economic Approach to Homosexuality* 6-7 (1992) (unpublished manuscript).

28. Posner offers a related and somewhat better analysis of prostitution, which he describes as "de facto polyandry" (p. 130) where some of the de facto husbands are bachelors; here, prostitutes, by acting as "de facto polyandr[ists]," effectively sell sexual services as a public good to men. Nevertheless, lower wages for women relative to men need not create increased demand for prostitution as Posner contends; lower women's relative wages increases the demand for *marriage* thus decreasing the demand for prostitution which, according to Posner, has come primarily from bachelors in some societies. Pp. 130-31.

Posner "describ[es] prostitution as a substitute for marriage in a society that has a surplus of bachelors," who "value prostitution more than married men do." P. 131. Posner, however, claims that "today, with the sharp decline in the number of heterosexual bachelors unable to form sexual relationships with unmarried women at reasonable cost, most customers of prostitutes are *performe* married men." P. 132, emphasis added. Limited empirical evidence, both for and against this proposition, is also presented. P. 132 n.47.

29. Gary S. Becker, *A Theory of the Allocation of Time*, 75 *ECON. J.* 493 (1965).

30. A normal or superior good is defined as a good of which more is consumed as income rises. JACK HIRSCHLEIFER, *PRICE THEORY AND APPLICATIONS* 100 (3d ed. 1984).

a natural conclusion of the household production model. It is not; of the two effects on sex resulting from higher wages, only the *substitution effect* implies that sex will decrease as wages increase (since the price of sex relative to work rises), while the *income effect* implies that sex will increase with income (which increases, of course, as wages increase) if sex is a normal good. Accordingly, the overall effect (substitution effect plus income effect) of higher wages on sex is theoretically indeterminate.

Finally, Posner's analysis of the "effective sex ratio" reveals additional shortcomings. Clearly, the effective sex ratio, the ratio of men to "available" women, is an important determinant of the cost of search (p. 136). The effect of this ratio is, however, significantly more complicated than Posner indicates. Posner emphasizes that the higher the ratio of men, the higher the search cost, for men, of heterosexual sex, and thus the lower the amount of search. This is true for a model in which men are the only searchers; Posner analogizes this situation to fishermen "fishing in a pond that has very few fish" (p. 136). Posner neglects that search in this context is bilateral; in the market for sex, the fish can catch the fishermen.<sup>31</sup> Consequently, while a higher effective sex ratio increases the cost of search for men (thereby reducing the amount they search), it reduces the cost of search for women, stimulating more search by women. As a result, the aggregate amount of search may actually increase.<sup>32</sup>

This section has discussed Posner's positive analysis of sex and sex laws. Posner's positive analysis of sex lawmaking was discussed in general terms as perhaps ill-conceived, given its reliance on efficiency as a primary factor explaining laws governing sex. The discussion of Posner's positive analysis of sexual behavior focused on specific applications. Many of these applications contain correct, informative economic analysis, but a number of remaining errors were described and corrected in this section. The subsequent section discusses the accomplishments and shortcomings found in Posner's *normative* analysis.

## II. POSNER'S NORMATIVISM

Beginning with Chapter Seven, "Optimal Regulation of Sexuality," Posner devotes much of the rest of the book to normative assessments of laws regarding sex. This normative analysis permits assessment of the desirability of legal rules pertaining to sex, thus advancing a step beyond positive analysis, which predicts the effect of legal rules with-

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31. Unilateral search by a particular party (the worker) has also been the almost exclusive model in the *labor* search literature. See THERESA J. DEVINE & NICHOLAS M. KIEFER, *EMPIRICAL LABOR ECONOMICS: THE SEARCH APPROACH* (1991).

Note that my own reanalysis of effeminacy and sexual search, *see supra* notes 23-24 and accompanying text, is limited by the use of a unilateral search model.

32. In this instance, Posner's androcentric model generates a different, arguably logically inferior, answer than the result generated by a gender-neutral model.

out evaluating them. As with the positive analysis, some of Posner's normative conclusions are well-founded and subtle; others, however, seem erroneous. Two types of error confound Posner's normative evaluations. The first is analytical error, either positive or normative, underlying his normative conclusions. The second is analytical incompleteness in omitting certain significant forms of behavior from his normative analysis, or assuming as societal aspirations certain objectives different than economic efficiency or other conceptions of social welfare maximization that clearly incorporate efficiency.<sup>33</sup>

Before discussing these problems it is worth considering the uncommon and thoughtful virtues of Posner's prescriptive analysis. For example, Posner provides intriguing and reasonable explanations for legal punishment of adultery and prostitution. Economists have left largely unexamined the existence of adultery and other fault grounds as *actual* marital offenses; they instead concentrate entirely on the charade that accompanied fault divorce in the United States and the consequent neutralization of any fault ground, so that fault served only as an instrument to obtain mutual consent divorce regardless of real fault.<sup>34</sup> Posner astutely recognizes that a fault ground, such as adultery, may have a substantive purpose in penalizing inefficient behavior. He notes that because the cost for the wife to monitor the husband at all times is high, the adulterous husband effectively imposes an externality<sup>35</sup> on his wife.<sup>36</sup> Alternatively, if the wife could, at no cost, discover if the husband has committed adultery, she would penalize him for each transgression, forcing the husband to account for the external cost of his adulteries. Because spousal monitoring *is* costly, legally requiring an adulterer to pay a larger divorce settlement can elicit the efficient amount of adultery.

More interesting is Posner's conclusion that laws against prostitution may be efficient. Again, legal intervention is a mechanism to re-

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33. Other reviewers have criticized Posner's normative application of cost-benefit analysis, what economists call Kaldor-Hicks efficiency, to sex. Nussbaum offers a view of Posner and economics as too limited to capture salient features illustrated in literary examples ("cases"): "[N]one of these cases can be exhaustively analyzed in terms of cost-benefit analysis — unless that analysis is made so multi-valued and so complex that it ceases to be, properly speaking, an economic analysis at all." Nussbaum, *supra* note 19, at 1693. But see *supra* note 19 (response to this argument). Eskridge and Hadfield press the point that endogenous factors make analysis impossible. Writes Eskridge, "Kaldor-Hicks analysis of sexual regulation ceases altogether to be scientific and becomes little more than organized cultural speculation." Eskridge, *supra* note 22, at 376; see Hadfield, *supra* note 22, at 489. Endogeneity does *complicate* but does not obviate economic analysis. Moreover, endogeneity is an equal problem for all other disciplines, but surely Eskridge and Hadfield would not suggest, therefore, that we abandon all social science.

34. See Zelder, *Inefficient Dissolutions*, *supra* note 9.

35. An externality is a cost or benefit, imposed on a third party, which is not accounted for in the first party's decisionmaking. See MICHAEL L. KATZ & HARVEY S. ROSEN, MICROECONOMICS 640 (1991).

36. P. 184. If the wife is the adulterer, the analysis is identical except that the roles are reversed.

duce the costs of monitoring, but in this case the law *implicitly* monitors how much a man spends on his children. That is, prostitution used by fathers signals that those fathers are diverting resources away from children (p. 186); increased spending on prostitution imposes a negative externality on children. Consequently, the law can efficiently tax this externality by punishing prostitution and thus deter fathers from employing prostitutes. This insight raises a more general question not raised by Posner: should the law tax not only prostitution but instead *any* spending by the parents on themselves which, by definition, imposes a negative externality on children?<sup>37</sup> Further reflection suggests that a form of this parental consumption tax is already in existence — the subsidy for leisure created by the income tax — thus providing an interesting efficiency justification for the income tax, at least for parents.

Posner's normative analysis of other areas of sexual regulation is more questionable. As a logical precursor to one example of normative analysis, consider his positive discussion of divorce law, in particular the idea of raising postdivorce payments to women.<sup>38</sup> Posner accurately recognizes that increasing payments creates three effects: wives increase their desire to divorce, husbands decrease their desire to divorce, and greater investments will be made within the marriage (as long as the payments are originally below the efficient amount and are linked to intramarital investments such as children) (p. 248). In fact, according to the Coase Theorem,<sup>39</sup> the first two effects exactly offset each other (so, for example, if the husband is made to pay an additional \$100 in divorce settlement, the wife consequently is \$100 better off from choosing divorce, leaving the surplus to divorce unaffected), although Posner only says that they "probably" will offset (p. 248); as a consequence, this policy recommendation would decrease the divorce rate due to the third effect. Furthermore, Posner returns to this point later but omits the second effect (on husbands) from consideration, concluding that the policy change would "leave the divorce rate unchanged" (p. 401).

Posner's analysis of marriage and divorce also questionably relies

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37. Any parental spending on themselves instead of their children is inefficient, no matter how altruistic parents are towards their children. This is an illustration of Zelder's "rotten altruist" theorem. See Martin Zelder, Could the American Adoption Market Possibly Be Efficient? Theoretical and Empirical Analyses 21-22 (Jan. 1993) (unpublished manuscript, on file with author). This is true as long as neither parents nor children are infinitely altruistic; rather, each party discounts, to some extent, the other's utility in determining his own utility.

38. P. 248. Posner effectively assumes that alimony and property do not currently compensate for a wife's foregone career opportunities

39. See R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). The version employed is the one in which there are no income effects as the result of enhancing wives' and reducing husbands' property rights upon divorce. This assumption is probably more justifiable in the dichotomous choice between marriage and divorce than in the commercial context where choices are incremental.

on a particular normative standard, that of "promot[ing]" and "preserv[ing] companionate marriage" (p. 249). Of course, Posner does not endorse this standard as equivalent to economic efficiency; rather, he describes his aspiration as "seeking *functional* explanations" for laws governing marriage and divorce instead of examining strictly economic normativity (p. 243; emphasis added). This decision to pursue functional explanations provides the potential for a positive (although not strictly economic) theory of marriage and divorce laws, a largely unexplored territory. At the same time, the decision clouds the normative assessment of marriage and divorce laws by implying that preserving and promoting companionate marriage is the desirable social goal. Moreover, a functional approach denies the reader any analysis of whether or not particular laws are efficient. In conceding to functional explanations, Posner sacrifices the distinctive ability of economic analysis to dissect and resolve competing normative arguments based on ill-defined goals (often suggested by other social sciences) such as the preservation and protection of companionate marriage. Posner only yields this amorphous goal when he claims that considerations such as "economizing on judicial resources" and "reducing perjury," actually minor issues next to efficient disposition of marriages, might "become decisive in favor of allowing either consensual divorce or divorce at will" (p. 252).

When he turns to the topic of abortion, Posner more closely approaches the proper use of an efficiency standard and, as a consequence, makes perhaps the strongest case found in the book for rational choice modeling of sexual behavior. In recognizing the benefits and costs associated with abortion, Posner admits that "it becomes difficult to deny the relevance of utilitarian considerations to the abortion debate" (p. 284). Posner frames the question in these terms when he declares:

The natural next step to take in a utilitarian analysis of abortion would be to trade off the benefits to the saved fetuses against the costs to their parents, to the parents' other children, to women (and men) induced to alter at some cost their sexual or contraceptive practices in order to adjust to the higher cost of abortion owing to its being illegal, and to women killed or injured by illegal abortions. [p. 285]

The most knotty theoretical problem underlying this "economic or utilitarian (these are not synonyms, but they are closely related) analysis of abortion" (p. 288) is the issue of weighing benefits and costs for fetuses, current *and* potential, an issue that clearly troubles Posner. He asks:

[S]hould the fetus be valued as the fetus itself would if conscious value it, or as the society values it? If the former method is used, few if any abortions of healthy fetuses could be defended on utilitarian grounds. But to use that method would commit us to a form of total utilitarianism, in which the aim is not to maximize the happiness . . . of a defined

population but to maximize the sum of happiness . . . in the universe, of which fetuses are undoubtedly a part. [p. 285]

In fact, the two possible measures contemplated by Posner should have the same value — in order to value the fetus efficiently, society should attach the same value to the fetus that the fetus would be willing to pay to avoid abortion. Valuing the fetus' life does not commit one to open Posner's Pandora's box, containing a mandate to "maximize the sum of happiness . . . in the universe, of which fetuses are undoubtedly a part," as, presumably, is every other current and future person (p. 285). Using economics to analyze the efficiency of abortion merely requires that, instead of maximizing the welfare of only those currently living, one should maximize the welfare of those currently living and those who might live as the consequence of the abortion law chosen.<sup>40</sup>

The category of "those who might live" includes the fetus and potential future fetuses. Posner realizes that, in many cases, abortion does not prevent a woman from giving birth, but merely postpones birth for that woman (p. 281). Indeed, using estimates made by others,<sup>41</sup> he calculates that in order to reduce the population by one, 1.83 abortions must occur (p. 282); in other words, 45% of abortions occur for the purpose of postponing birth. Call this process of postponing birth *intertemporal substitution*. Incorporating intertemporal substitution into the efficiency calculation implies that the average social cost of an abortion is 55% (100% - 45%) of the value of a fetus' future life.

While Posner appreciates this crucial logical point, he unfortunately entangles himself in the separate proposition that "society . . . sets a much lower value on fetal life than on the life of a child or an adult" (p. 285). As a consequence, according to Posner, "[a] utilitarian analysis suggests that the later the decision to abort is made, the weaker are the reasons for the law to respect that decision" (p. 285). One minor reason for this conclusion is that, for a late abortion, "the health and hence the life prospects of the fetus can be better assessed and so the costs of lost life expectancy may be higher too" (p. 285). More important to Posner, however, is the notion that the life of a fetus is thought to be worth less than that of a child, and that this difference in value shrinks as the fetus ages:

There is a difference between being prevented from killing a child and being forced to carry a child (if that is how we choose to regard a fetus) inside your body. The difference becomes slight, it is true, once the fetus reaches the point at which it can live outside the mother's body . . . . But

40. Note that maximizing welfare over current and potential future people is accepted and uncontroversial in public policy discussions of environmental and other kinds of regulation. See EDWARD M. GRAMLICH, *BENEFIT-COST ANALYSIS OF GOVERNMENT PROGRAMS* 101 (1981).

41. Stephen P. Coelen & Robert J. McIntyre, *An Econometric Model of Pronatalist and Abortion Policies*, 86 J. POL. ECON. 1077, 1097 (1978).

that is just one more argument against late abortion, and there are plenty of arguments already. It is early abortion that is the tough issue, and here the analogy to infanticide weakens. The human fetus is not even an inch in length until about eight weeks, not two inches until twelve weeks. [p. 290]

The assumption, however, that the value of the fetus' life varies significantly depending on the stage of pregnancy is incorrect when confronted with economic reasoning. The value of the fetus' life is the amount the fetus would be willing to pay the mother to prevent the abortion, but this transaction does not occur because transaction costs are infinitely high — the fetus cannot communicate with the mother. Posner is correct that economics cannot reveal when life begins (p. 279), but the more important point is that it does not matter. What matters, logically, is that there *may* be potential mutually beneficial transactions between a child and a mother that cannot occur because the child's agent, the fetus, cannot communicate with the mother. The value of that transaction to the child is the value the child attaches to her life, a value which is invariant with the stage of pregnancy (except for some small discount for prenatal mortality that declines as the pregnancy advances).

This value must be weighed against the possible life taken away from the potential future fetus if the current fetus is allowed to live. As noted above, perhaps 45% of abortions serve to postpone births; so, conversely, allowing the average abortion saves the life of a future fetus 45% of the time. To make efficiency decisions, this saving must be weighed, along with the direct benefit to the mother, against the cost to the current fetus.

The logic underlying this more complete analysis of abortion also applies to infanticide, a subject Posner discusses in this context (pp. 281, 289-90), and to contraception, a logical extension Posner neglects in his discussion of *Griswold*.<sup>42</sup> Justifying infanticide is possible on efficiency grounds, but is more difficult than justifying abortion. Infanticide involves the same costs and benefits as abortion with one important exception — the value of investments in the child made by parties other than the mother. The realization that an infant is more likely to be exterminated if infanticide is unpunished will discourage investments in her by relatives, by friends and, probably in rudimentary ways, by herself.<sup>43</sup> Justifying the use of contraception on effi-

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42. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (state statute preventing contraception use or advice violates constitutional right to privacy). This analogy was first emphasized to me in a conversation with Margaret Simpson.

43. It is conceivable that violence and neglect, possible precursors of infanticide, might provide signals to an infant that infanticide is more likely to occur. Receiving these signals, an infant might respond by reducing rudimentary investments in feeding and expressing preferences, which occur, on average, at six to seven months of development. See RONALD S. ILLINGWORTH, *THE DEVELOPMENT OF THE INFANT AND YOUNG CHILDREN NORMAL AND ABNORMAL* (9th ed. 1987).



ciency grounds is more straightforward. Regulation of contraception is likely inefficient due to the high legal transactions costs of regulating, say, condoms, plus the high resource cost of substitution towards abortion, a more expensive form of birth control.

Ultimately, two modest problems hinder Posner's economics of abortion. First, some of the analysis is done incorrectly, in particular, the weighing of the value of the fetus' life. The second weakness is a startling and ironic one for a University of Chicago law-and-economics scholar: Posner's conception of the substantive span of economics is too narrow, despite the ostensible premise of his book. Consider two examples. Posner salutes the empirical work on abortion (done by others) which, after taking account of marital status, public aid reciprocity, urban residency, and educational status, finds that Catholic affiliation has no statistically significant effect on the decision to abort — "a result that attests to the power of the economic model" (p. 278). In contrast, the work of Becker<sup>44</sup> and others following in his wake fundamentally incorporates the idea that religious affiliation is an economic variable, in this case, an implicit component of the price of abortion.<sup>45</sup> Elsewhere, Posner dismisses gender choice as a "completely frivolous" ground for an abortion (p. 279). Gender choice may be a *small* benefit associated with abortion; nevertheless, it is a benefit, and to dismiss it categorically derogates the true "economic model of human behavior."

Greater difficulties are encountered in Posner's analysis of adoption.<sup>46</sup> First he makes factual errors. For example, Posner writes that "[i]n most states, only adoption agencies may lawfully supply children for adoption. The agencies are *private* organizations, most of them non-profit" (p. 409; emphasis added). In fact, adoptions made by independent, nonagency brokers are legal in forty-six of fifty-one U.S. jurisdictions; and 57% (20,064 of 35,127) of all agency adoptions occur via *public*, not private, agencies.<sup>47</sup>

Posner's discussion raises the more fundamental issue of whether current adoption law is desirable and how it should be reformed. In addition to the rare prohibitions on independent adoption and the prominent activity of agencies, which use nonprice screening methods to allocate children to adoptive parents, Posner also mentions the statutory bars against "baby-selling" (p. 411). "Baby-selling" laws, which are ostensibly enforced in forty of the fifty-one American jurisdic-

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44. See GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 190 (1976).

45. It is also a component, and a statistically significant one, of the implicit price of divorce. See Zelder, *Inefficient Dissolutions*, *supra* note 9.

46. This is an issue Posner has pursued elsewhere as well. See Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59 (1987).

47. NATIONAL COMMITTEE FOR ADOPTION, *ADOPTION FACTBOOK* 80, 84-85 (1989).

tions,<sup>48</sup> impose penalties for any adoption transaction involving payments beyond statutorily allowed personal and medical expenses.<sup>49</sup> Essentially, transactions above a certain price are "taxed" (the law, with some probability, imposes fines and prison terms), while transactions below that price are not "taxed."<sup>50</sup> Posner criticizes the current regulation as setting a price ceiling, in which no transactions are allowed above a certain price (really a simplified version of the tax described above), and argues that "[t]he straightforward way to deal with the problems created by a price ceiling is to remove the ceiling. Why has this not been done in the adoption market . . ." (p. 411)?

Economic analysis reveals in response that unregulated adoptions, while beneficial to each set of parents (biological and adoptive), can be harmful or beneficial to the children, effects not accounted for by parents, who in effect impose an unregulated externality on children.<sup>51</sup> While Posner recognizes this as a potential problem of unregulated adoption, he dismisses this concern as, logically, a "bad one[ ]" or one that "could easily be met by placing minor restrictions on an otherwise free market" (p. 411). Contemplation of the workings of "an otherwise free market" for children leads *instead* to the realization that *significant* regulation is probably necessary to prevent inefficient externalities, and that the efficient "tax" on adoptions may be quite surprising in its formulation.<sup>52</sup> Nevertheless, these potential externalities may be internalized by the parents without legal intervention; older children who are at risk of being relinquished for adoption may bargain with their parents to prevent the adoption from happening.<sup>53</sup> The compensation offered by the child could include time (say, doing housework), behavior (say, less cursing at the parents), and money (returning to the parents some of the resources parents originally transferred to the child).<sup>54</sup> Posner neglects this point and quotes, in his support, Gary Becker and Kevin Murphy's paper, *The Family and the State*: "But even children who would suffer greatly might be sold because they have *no way* to compensate their parents for keeping them."<sup>55</sup>

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48. Zelder, *supra* note 37, at 5.

49. *See id.* at 3.

50. *Id.* at 24.

51. *See id.* at 21-22.

52. For details, see *id.* at 24-26.

53. *See id.* at 19-20. Note that 52% (26,568 of 51,157) of 1986 adoptions by unrelated adoptees were of noninfants, that is, children two years or older. *See* NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK, *supra* note 47, at 80.

54. *See* Zelder, *supra* note 37, at 19-20.

55. P. 415 (quoting Gary S. Becker & Kevin M. Murphy, *The Family and the State*, 31 J. LAW & ECON. 1, 14 (1988), reprinted in BECKER, *supra* note 8, at 376) (emphasis added). Contrary to this surprising quotation, a prominent theme of that paper and Becker's work in general is the possibility of efficient compensation paid from child to parent and *vice versa*.

Posner also focuses on children who are sexually abused. He assumes that parents are only interested in abusing noninfants,<sup>56</sup> and, presumably, that abuse is never part of an efficient parent-child bargain, an eminently reasonable point. He further makes the economic argument that adoptive parents are more likely to commit sexual abuse than biological parents because the price of abuse is lower for adoptive parents, since they are not abusing their own genetic material. Thus, Posner proposes possible regulation only for noninfant adoptions (pp. 412, 416). This, however, is a minor point in comparison to the conclusion, based on the possibility of child-parent bargaining, that older children require *less* legal protection than younger children, as the latter are less likely to possess the resources or legal competence necessary to bargain efficiently with parents.<sup>57</sup>

For economic analysis of sex to be meaningful, it must ultimately enable lawmakers to choose among alternative legal rules on the basis of a particular normative standard, such as economic efficiency. By this criterion, Posner's normative analysis in *Sex and Reason* is certainly worthwhile. Some significant defects, however, still mar his normativity. Principal problems are incorrect economic analysis of some issues, such as divorce and adoption, and reliance on a normative standard, the preservation and protection of compassionate marriage, which is vague and probably not a close approximation of economic efficiency. Still, significant amounts of Posner's normative assessments of adultery, prostitution, and abortion reflect real advances in the application of economic analysis.

### III. POSNER'S RHETORICISM

On two topics, rape and "homosexuality," the admirably wide scope and detailed analysis of *Sex and Reason* are overshadowed by the rhetoric chosen to discuss these issues; however, this rhetoric is definitely not an implication of or an accommodation to economic analysis of these issues. Ironically, in forming these rhetorical points, Posner is perhaps likely to undermine the possibility that readers will display any receptivity to economic analysis.

Posner is to be applauded initially, though, for some worthy attempts to bring economic analysis to bear on the question of rape.<sup>58</sup> He notes two primary pieces of evidence suggesting the economic rationality of rapists: Isaac Ehrlich's<sup>59</sup> finding that rape incidence is de-

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56. "Very few child abusers have a sexual interest in infants." P. 412.

57. See Zelder, *supra* note 37, at 19-20, 22-23.

58. This analysis, however, is based on the perhaps dubious claim that "[c]ontrary to a view held by many feminists, rape appears to be primarily a substitute for consensual sexual intercourse rather than a manifestation of male hostility toward women or a method of establishing or maintaining male domination." P. 384.

59. Isaac Ehrlich, *Participation in Illegitimate Activities: An Economic Analysis*, in *ESSAYS IN*

tered by higher penalties (p. 386), and anthropological data showing that rape incidence rises with brideprice (p. 384). Only the former is logically defensible evidence, however, as the brideprice data, obviously, do not control for the intellectual, emotional, and physical attributes of the women in the sample.

Posner also takes on an important theoretical issue in setting rape punishment, the problem of proof (p. 388). Like other crimes with no necessary physical evidence or third-party eyewitness testimony (for example, bribery, fraud), the difference between consensual and non-consensual exchange must be resolved by testimonial evidence of plaintiff and defendant, unless a default rule indicates either "no intercourse is rape" or "all intercourse is rape." It is precisely this problem of proof to which the latter proposition, attributable to a number of feminist commentators, speaks.<sup>60</sup>

A third issue Posner considers is the problem of applying an economic efficiency criterion to a crime such as rape. Posner notes that "utilitarianism" calls for the valuation of the rapist's utility (p. 386); a valuation which could lead, presumably, to normative acceptance of rape. Posner makes a cryptic attempt to distinguish economic analysis from utilitarianism when he writes, "[b]ut to suppose that the rational model stands or falls with utilitarianism is to confuse positive with normative analysis" (p. 386). He then claims that the possibility of counting the rapist's utility as part of social welfare could not lead to rape being regarded as efficient (pp. 386-87). In fact, if the rapist's utility is included in measuring social welfare, rape could be efficient; the solution to this problem, however, is not to discard efficiency as a social welfare standard, but to retain it and to make efficiency calculations excluding the utility of the rapist (or any criminal, generally).<sup>61</sup>

Posner leaves behind these more social-scientific concerns, however, to engage in speculation regarding the very nature of rape. On the incidence of marital rape, he writes, "[m]arital rape may be uncommon, since few wives will refuse their husband's demand for sexual intercourse" (p. 389). One could dramatically restate the proposition by substituting "ubiquitous" for "uncommon." As to the disability caused by a marital rape, Posner offers:

The nature of the harm to the wife raped by her husband is somewhat *obscure*. . . . Especially since the goods of virginity and of chastity are not endangered, the fact of her having intercourse one more time with a man with whom she has had intercourse many times before seems marginal to the harm actually inflicted . . . . [p. 390; emphasis added]

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THE ECONOMICS OF CRIME AND PUNISHMENT 68 (Gary S. Becker & William M. Landes eds., 1974).

60. See ANDREA DWORKIN, *INTERCOURSE* (1987).

61. Exclusion of a criminal or civil offender's utility (realized from committing an offense) in making social welfare calculations is arbitrary, but this compromise is arguably more consistent than nonexclusion combined with a different welfare standard.

He subsequently identifies "control over . . . sexual and reproductive capacity" as the primary issue in marital rape (p. 390). Later, Posner does acknowledge the "serious" "long-term emotional and psychological effects of marital rape" (p. 391), although this point appears ancillary to his focus.

No ambiguity exists, however, with regard to his discussion and analysis of clitoridectomy, a passage that reaches a horrifying "logical" conclusion as the direct consequence of Posner's misrepresentation of economics.

What is the mechanism, akin to self-interest at the level of individual decision making, by which efficient laws and customs are generated? This question has puzzled economic analysts of law, but in some cases a Darwinian type of answer is plausible. Take a custom such as clitoridectomy. Suppose in some primitive society the role of the clitoris in female orgasm is noticed, and it is also noticed that women with a highly developed capacity for sexual pleasure are more susceptible to the blandishments of seducers. A polygamist, or for that matter the father of a girl, might tumble to the idea that a wife whose clitoris was removed would require less supervision by her husband. Such women would become more valuable in the marriage market . . . than other women, and polygamists whose wives were circumcised would prosper more than other polygamists. So the benefits of the practice would be perceived, and eventually it would become generalized and regularized in the form of a custom understood to be normative. [p. 214]

Posner is correct that forced clitoridectomy is efficient in a society in which women are property and not actors whose welfare is valued in determining efficiency. Forced clitoridectomy is probably not efficient, however, if economists value the utility of women in calculating social welfare, as they commonly do. For Posner then to conclude from his gory primitive legal vignette that "[t]he assumption that efficiency should guide public policy is contestable" (p. 214) is almost entirely unfounded<sup>62</sup> and a distortion of, and disservice to, economic analysis.<sup>63</sup>

Posner also devotes a thirty-three-page chapter to "Homosexuality: The Policy Questions." Even as an economist who teaches family law, I found it difficult to imagine what these "questions" might be. Admittedly, legal controversies surround sexual orientation, but that does not mean that these legal controversies present any interesting questions from the perspective of economic analysis. Indeed, the only way homosexual orientation would raise a question meriting law-and-economics scrutiny is if homosexuality were the source of a market

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62. The only possible basis for Posner's rejection of an efficiency standard in this case is the argument that if men in a society regard women as property, efficiency calculations should be made using their frame of reference rather than the frame of reference of those, including most economists, who would count women as people.

63. As with sexual search, *see supra* note 32, androcentric modeling produces a logically inferior result.

failure, that is, an inefficiency arising due to the existence of externalities, public goods, monopoly or other strategic behavior, rent seeking, or missing markets.<sup>64</sup> In a conventional sense, however, no market failures arise directly from homosexuality. The only possible market failure that legitimately and generally exists is what I have labeled "moral externalities," that is, externalities which are not concrete but which do in some metaphysical sense actually harm others. Consequently, the thought that sodomy is unpunished, and is assumed by nonparticipants to occur, could reduce the utility of some nonparticipants.<sup>65</sup> The only effective way to regulate such an externality is to devise a liability rule, or tax, on sodomy; a property right, the other general tool of regulation, would not work because the involved parties (the participants and nonparticipants) probably do not know each other, so transaction costs are prohibitive.<sup>66</sup> Ignoring the legal transaction costs of enforcement, such a liability rule could induce the efficient amount of sodomy to occur; but taking into account the legal transaction costs of deterring sodomy (the cost of invaded privacy plus the cost of estimating the external harm) probably leads to the conclusion that leaving sodomy alone is efficient.<sup>67</sup> Moreover, the cost of estimating the harm to society from all moral externalities is huge, as clearly moral externalities may exist, or be alleged to exist, with regard to any privately conducted human activity.

The foregoing is the *strong* economic argument in favor of regulating sodomy, even though it is admittedly quite limited. The only other issue that provides a basis for regulation of the gay community is AIDS and, of course, this basis is not exclusive, for heterosexuals can also transmit and contract AIDS from heterosexual activity. Posner understands that no externality arises from AIDS or any sexually transmitted disease unless contractual problems such as nondisclosure are implicated; as he asserts, "when a person engages in sexual acts that harm other persons without their explicit or implicit consent, there is a case for social intervention."<sup>68</sup> The extent to which there is

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64. See Zelder, *supra* note 14, at 10-31 (discussing these market failures).

65. See *id.* at 60. Ironically, the adjective "moral" qualifies "externalities" in such a way that it is a positive, not normative, concept; "moral" refers not to the lawmaker's (or author's) conception of behavior, such as sodomy, but the conception of individuals affected by the occurrence of sodomy in society. Notice also that the externality may be positive, not negative, for some or all people. If sodomy created a positive externality, it would be efficient for the state to subsidize it.

66. If transactions costs are prohibitive, individuals will not trade their property rights.

67. See Martin Zelder, *Beyond the Coase Theorem: Choosing Between Property Rights and Liability Rules Under a Social Welfare Function Which Incorporates Transactions Costs* (Mar., 1992) (unpublished manuscript) (discussing the importance of transactions costs in choosing a legal rule).

68. P. 182. Posner's discussion of this subject in the book is relatively brief; he has, however, coauthored a more extensive work on the subject. See TOMAS J. PHILIPSON & RICHARD A. POSNER, *PRIVATE CHOICES AND PUBLIC HEALTH: AN ECONOMIC APPROACH TO THE AIDS EPIDEMIC* (forthcoming).

nondisclosure between sexual partners, and the resulting inefficient spread of AIDS, is the extent to which a market failure occurs that *may* be a consequence of "homosexuality." Other than that, the only clear-cut externality resulting from AIDS is on children born to the HIV-infected, but no known legal restrictions prohibit the procreative activities of HIV-infected individuals.<sup>69</sup>

The foregoing two paragraphs constitute a comprehensive law-and-economics analysis of the regulation of "homosexuality." Posner's much more extensive treatment of the subject (pp. 293-323) begins with a critical assessment of the data on the prevalence of homosexual orientation. Posner severely questions the commonly stated 10% figure, which is derived from Kinsey data on men published in 1948,<sup>70</sup> comprised of 4% reporting lifetime homosexuality and 6% reporting homosexual orientation for a period of at least three years between the ages of sixteen and fifty-five (p. 294). Posner discounts the 6% figure to 2% primarily by speculation.<sup>71</sup> He acknowledges the Kinsey finding that 13% of women sampled had experienced orgasm as a consequence of a lesbian encounter,<sup>72</sup> but he interprets this as meaning that only 2% of women are actually lesbians (p. 294). He then enumerates other studies that estimate figures lower than 10% (p. 294).

Certainly it is important to apply careful social-scientific scrutiny to the data on sexual orientation. Doing so, however, might produce the conclusion that a 10% figure is an *underestimate* of homosexual orientation. Posner is probably correct that not all members of the three-years-or-more gay group should be counted as gay in orientation, but this statistical bias is not the only one worthy of contemplation. He also recognizes that

it is possible that although only people with deep-rooted homosexual preference would "choose" homosexuality in a society that makes it a costly choice, were the costs reduced by the repeal of legal disabilities and the growth of social tolerance, a number of young people who were on the borderline between homosexuality and heterosexuality would cross the line, and the population of homosexuals would swell. [p. 297]

Social costs discourage people from engaging in homosexual behavior and from reporting homosexual orientation. Posner, however, dismisses social costs as an important factor, citing lower levels of homo-

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69. AIDS testing is only required in a few jurisdictions as a condition for receiving a marriage license and, in a nonrandomly sampled jurisdiction, the only consequence of a positive test result is that the individual is advised of that result. See MICH. COMP. LAWS ANN. § 333.5119 (West 1980).

70. ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 651 (1948).

71. In reducing the Kinsey 6% figure for three-year-or-more homosexuals to 2%, Posner offers, without citation, the claim that the subtracted 4% "probably consisted mainly of heterosexuals who in adolescence turned to homosexuality for want of female companionship, and in addition prisoners, who were overrepresented in the sample." P. 294 (emphasis added).

72. The comparable figure for men is 37%. Kinsey, *supra* note 69, at 474-75.

sexual orientation in "tolerant" societies such as Sweden, the Netherlands, and Japan, as compared to the higher level in the less tolerant United States (p. 297), even though tolerance is not precisely measured and other characteristics of these populations are not controlled.<sup>73</sup> Only a study that measured tolerance and controlled for intercountry differences in other respects, and then found no effect on homosexual orientation, would support Posner's rejection of intolerance as an important factor that might bias downward the reported prevalence of homosexual orientation. Indeed, this bias might more than offset the upward bias from counting three-year-or-more homosexuals as "part of the 10% figure."

Posner also mounts an argument that homosexuals are fundamentally worse off (that is, inherently less happy regardless of legal or social intolerance) than heterosexuals (pp. 300-09). The evidence that Posner presents, however, does not support this conclusion, but rather, the opposite one. In discussing a study that discovers homosexual cohabitations to be more long-lasting<sup>74</sup> than heterosexual cohabitations, although less so than marriages, Posner first correctly notes that this result might not exist if homosexuals were allowed to marry and if the homosexual relationships left as cohabitational ones after some gay couples married were shorter in duration than heterosexual cohabitations (p. 306). Posner then averages together the longevity figures for the two heterosexual groups — cohabitants and married couples — and finds that this "overall" heterosexual longevity figure is greater than the original figure for homosexual cohabitants (p. 306). This comparison would indicate that heterosexual relationships are more long-lasting than homosexual ones *if* there were no legal benefits to marriage; but there are, of course, many such legal advantages, including inheritance, insurance, and pension benefits.<sup>75</sup>

Posner dismisses another study, which found "relationship quality" for homosexual couples equal to that of married couples and higher than that of cohabitating heterosexual couples, because the sample of heterosexuals was childless and the average relationship duration for the married couples was longer (fifty-two months) than for gay and lesbian couples (forty-two months) (pp. 306-07). The second piece of evidence on duration indicates, however, that measured "relationship quality" for married couples overstates true "relationship quality"; the marriages surviving fifty-two months are, according to

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73. Anderson disputes Posner's description of the United States as relatively intolerant of homosexuality. See Robert M. Anderson, *EP Seeks EP: A Review of SEX AND REASON* by Richard A. Posner, 31 J. ECON. LITERATURE 191, 193-94 (1993).

74. As time passes, lower quality relationships, those which are not mutually beneficial, are terminated, while better, mutually beneficial ones persist.

75. Eskridge lists many legal benefits to marriage in the District of Columbia. See Eskridge, *supra* note 22, at 354-55.



economic analysis, those of higher quality, on average, than those which end earlier.

The first point, about childlessness, raises a more basic problem with Posner's normative analysis of homosexuality. Sampling only heterosexuals without children is one possible, simple, statistically controlled method to compare the "relationship quality" enjoyed by heterosexuals and childless homosexuals.<sup>76</sup> Even if perfectly controlled tests found heterosexuals to have higher "relationship quality," however, it is troubling to encounter the apparently serious suggestion that "[m]aybe we should just be patient; science, which has worked so many wonders, may someday, perhaps someday soon, discover a 'cure' for homosexuality" (p. 308). After all, Posner's approach seems that, given biological orientation, people select sexuality (heterosexuality or homosexuality) in a way that maximizes their welfare, although an individual may choose occasional sex outside the gender of her orientation. Homosexuals are those people who prefer, given their orientation, to be homosexual. "Converting" them would reduce their well-being, just as would converting coal miners to a safer job for which they qualify. Moreover, even if a difference in quality were somehow measured, it might well reflect discrimination that, if eliminated, would equalize quality of life for homosexuals and heterosexuals. In place of a policy of "conversion," public policy could be shaped to eliminate much of this discrimination by encouraging heterosexuals to tolerate alternative sexual orientations.

Other passages in the book, describing homosexuality as possibly a "vicious choice of life-styles" (p. 295), and asserting that "[i]t might seem that the fewer homosexuals there are, the less dangerous they are along whatever dimension there is reason to fear them" (p. 295), while not intended to reflect Posner's personal views,<sup>77</sup> might to many readers seem to suggest such views. Similarly, while Posner indicates that a laundry list of gay stereotypes are held by "men who are disgusted by homosexuals," the extent and nature of the list ("pervaded with effeminacy, including physical weakness and cowardice," "promiscuity," "seduction of the young," "furtiveness and concealment," "bitchy, gossipy, histrionic, finicky, even hysterical manner," "bad health, physical and mental," "general immorality and unreliability," "and, of course . . . narcissism" (pp. 300-01)) seem more than what is necessary to establish the existence of these stereotypes. Finally, Posner's strong words about AIDS suggest the desirability of paternalism

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76. There are, of course, statistical problems with this comparison in that the couples who choose not to have children may be inherently less happy than other couples, regardless of the presence of children. Note also that homosexual couples *with* children could be statistically compared to heterosexual couples with children.

77. Letters from Judge Richard A. Posner to Martin Zelder (Sept. 18, 1992 and Mar. 15, 1993) (on file with author).

in light of apparently irrational individual behavior, a surprising suggestion in the larger context of the book:

An intelligent person understands that one is dealing with a strong desire that must be kept in place, not allowed to dominate or endanger *one's* life. It should not have required AIDS to teach this lesson. Not everyone is intelligent or self-controlled, however, and when a person engages in sexual acts that harm *other* persons without their explicit or implicit consent, there is a case for social intervention. [p. 182; emphasis added]

As noted before, regulation is necessary for externalities resulting from AIDS, but the issue of "endanger[ing] one's life" seems to question whether people acquiring AIDS are rational. For the purposes of this review, I need only emphasize that this idea contradicts the "reason[ed]" basis of the rest of the book.

#### IV. RATIONAL SEX AFTER POSNER

*Sex and Reason*, despite its numerous problems, has helped to define a number of research questions and suggest some answers for the nascent economics of family law. The book is a beginning, not an end, to a project which will invite the efforts of many legal scholars, including economists. This review is an attempt to assess what fraction of the Posnerian foundation to accept and what fraction to rebuild. Posner is right that this endeavor "deserves our best intellectual efforts" (p. 10); it is the sincere task of this review to meet that goal by setting the record straight on the economic analysis of sexual behavior and regulation, taking into account the useful contributions and profound limitations of *Sex and Reason*.